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PP v. PHILIP LUNEY

HIGH COURT SABAH & SARAWAK, SIBU
WONG SIONG TUNG J
[CRIMINAL REVISION: SBW-43-1-1-2024]
27 FEBRUARY 2024

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Abstract – *It is incorrect in law to reject an application for remand under s. 117 of the Criminal Procedure Code of a suspect for an offence under the Malaysian Anti-Corruption Commission Act 2009 ('MACC Act') based on the existence of provisions under s. 49 of the MACC Act by applying the maxim 'generalibus specialia derogant.'*

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CRIMINAL PROCEDURE: *Revision – Application for – Application to review decision of Magistrate rejecting application for remand of suspect pending investigation under s. 17(a) of Malaysian Anti-Corruption Commission Act 2009 ('MACC Act') – Whether provisions of general statute under s. 117 of Criminal Procedure Code yield to those of specific ones under s. 49 of MACC Act – Whether maxim of 'generalibus specialia derogant' applicable – Whether application for revision ought to be allowed – Criminal Procedure Code, s. 323*

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This was an application by the Deputy Public Prosecutor ('DPP') under s. 323 of the Criminal Procedure Code ('CPC') to review the decision of the Magistrate in rejecting the application by the DPP for a remand of the respondent pending investigation under s. 17(a) of the Malaysian Anti-Corruption Commission Act 2009 ('MACC Act') for which the respondent was suspected to be involved. Upon examining the entire record and proceedings in the Magistrates' Court called for pursuant to and as required under s. 323 of the CPC, the Magistrate at the very outset of his ruling held that the 'provisions of a general statute' (s. 117 of the CPC) 'yield to those of specific ones' ('s. 49 of the MACC Act'). The Magistrate held that s. 117 of the CPC could not apply and the application by the DPP could not be made thereunder in view of the provisions under s. 49 of the MACC Act. In rejecting the applicant's application for remand of the respondent under s. 117 of the CPC, the Magistrate had applied the maxim of '*generalibus specialia derogant*'.

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Held (setting aside decision of Magistrate):

(1) In view of the decision of the Court of Appeal in *PP v. Sathivel Subramaniam & 5 Ors*; Rayuan Jenayah No. C-06A-7-05-2023, which was binding on this court and the subordinate courts, it was incorrect in law, to apply the maxim '*generalibus specialia derogant*' and conclude that, due to s. 49 of the MACC Act, there was no scope for application under s. 117 of the CPC. In the circumstances and premises, it was desirable that this court should allow the criminal revision as applied for by the DPP. Allowing the criminal revision as applied for by the DPP serves

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to dispel any lingering uncertainties on the issue that may persist in the subordinate courts due to similar contentions being raised to oppose such applications. The decision of the Magistrate was therefore set aside. (paras 12, 20 & 21)

Case(s) referred to:
Dalam Perkara Sathivel Subramaniam & Yang Lain [2023] 7 CLJ 223 HC ***(ovrd)***
PP v. Mohd Shaifuldin Khairudin & Ors [2006] 5 CLJ 678 HC ***(refd)***
PP v. Sathivel Subramaniam & Ors (Rayuan Jenayah No: C-06A-7-05-2023) (Unreported) ***(foll)***
PP v. Vira Prihatin & Ors [2018] 8 MLJ 421 ***(refd)***
Ting Tiong Choon v. PP [2016] CLJU 1612; [2016] 1 LNS 1612 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 117(2)(b), 323
Malaysian Anti-Corruption Commission Act 2009, ss. 17(a), 49(1), (2), (3), (4), 53(3)

For the prosecution - Nur Nisla Abdul Latif; DPP
For the respondent - Yap Hoi Liong & Ben Lau Le Bin; M/s Yap Hoi Liong & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Wong Siong Tung J:

[1] This is an application by the DPP under s. 323 of the Criminal Procedure Code (CPC) to review the decision of the learned Magistrate made on 12 January 2024 Sibu Magistrate's Court Remand Application: SBW-89RE-29-1-2024 in rejecting the application by DPP for remand of the respondent pending investigation under s. 17(a) of the Malaysian Anti-Corruption Commission Act 2009 (MACC Act) for which the respondent was suspected to be involved.

[2] The respondent was arrested on 11 January 2024. On 12 January 2023, the DPP applied to the learned Magistrate under s. 117(2)(b) of the Criminal Procedure Code for the respondent to be remanded for seven days on the grounds among them are:

(i) there is a need to record a statement of the respondent under s. 53(3) of the MACC Act;

(ii) preventing the respondent from interfering with the main witness involved in the case which the suspect knew;

(iii) preventing the respondent form removing and destroying evidence associated the offence the respondent was suspected of having committed; and

(iv) preventing the respondent from communicating with any accomplices of the respondent who are still at large and to put the case at risk.

[3] Section 49(1) of the MACC Act made every offence under the Act seizable offence. Section 49(2) provides for a suspect arrested to be released upon giving of securities such as cash deposit or bond with or without sureties as may be required by the officer of the commission.

[4] Under s. 49(3) of the MACC Act, if the officer of the commission has reasonable grounds to believe that any bail condition has been or is likely to be broken, the suspect may be re-arrested without warrant.

[5] Under s. 49(4) of the MACC Act, when a suspect is rearrested under s. 49(4), the suspect must be brought before a Magistrate within 24 hours, who may remand them in custody or grant bail under suitable conditions.

[6] Upon examining the entire record and proceedings in the Magistrates' Court called for pursuant to and as required under s. 323 of the CPC, the learned Magistrate at the very outset of his ruling on 12 January 2024 and in agreement with the submission of learned counsel for the respondent before him of the application of the maxim "*generalibus specialia derogant*", held that "the provisions of a general statute" (s. 117 of the CPC) "yield to those of specific ones" (s. 49 of the MACC Act).

[7] The learned Magistrate has thus agreed with the submission of learned counsel for the respondent that s. 117 of the CPC could not apply and application by the DPP could not be made thereunder in view of the provisions under s. 49 of the MACC Act 2009.

[8] It seems that in rejecting the applicant's application for remand of the respondent under s. 117 of the CPC, the learned Magistrate has basically applied the maxim of "*generalibus specialia derogant*" as contended by the learned counsel for respondent who cited the High Court decision reported in *Dalam Perkara Sathivel Subramaniam & Yang Lain* [2023] 7 CLJ 223 which decision was binding on the learned Magistrate.

[9] This gives rise to serious doubts that the learned Magistrate has in fact considered the DPP's application for remand in the light of and applying the criteria under s. 117 of the CPC, contrary to the submission of the learned counsel for the respondent before this court, claiming that the learned Magistrate has nevertheless properly considered the DPP's application under s. 117 of the CPC.

[10] Contrary to the submission of learned counsel of the respondent before the learned Magistrate, the High Court decision in *Dalam Perkara Sathivel Subramaniam & Yang Lain* [2023] 7 CLJ 223 has been overruled by the Court of Appeal in *PP v. Sathivel Subramaniam & 5 Ors*; Rayuan Jenayah No. C-06A-7-05-2023 on 15 August 2023.

[11] The broad grounds of the Court of Appeal's decision as recorded in the notes of proceeding for the ruling on 15 October 2023 in the Court of Appeal in *PP v. Sathivel Subramaniam & 5 Ors*; Rayuan Jenayah No. C-06A-7-05-2023 reads as follows:

We allow the appeal for the following reasons.

We are of the view that the learned JC had erred in his interpretation and application of s. 49 of the MACC Act.

We note that there is no specific provision in the MACC Act as to the cause of investigation which are not completed within 24 hours of the arrest of a person. In the circumstances, we are of the view the that provisions of s. 29(3) of the Act would apply and the MACC officer may apply to the Magistrates' Court for a remand order under s. 117 of the CPC to carry out further investigation.

We are unable to accept the contention by the learned counsel of the respondent Dato' Geethan that the remand provisions in s. 117 CPC cannot be resorted to in the first instance and that the only option available to the MACC officer is to release the arrested person on a bond under s. 49 if investigation cannot be completed within 24 hours and that a remand order can only be applied for if there is a breach or anticipated breach of the bond.

We are of the view that such reading of the provisions of the MACC Act would bring about anomaly in the law. Particularly, in respect of the investigating powers of the MACC on the one hand and other investigating agencies such as the police or the others.

We are of the view that the provisions of s. 29 & 49 of the Act must be read harmoniously. Such that the MACC officers can resort to the provision of s. 29 and apply for a remand order from the Magistrate under s. 117 CPC if investigations cannot be completed within 24 hours of the arrest of a person, provided of course that the officer is able to convince Magistrate as to need of a remand order.

In the circumstance, we find that there is merit in the appeal and therefore we allowed the appeal and set aside the order of the High Court of Temerloh.

[12] In view of the decision of the Court of Appeal on 15 August 2023 in *PP v. Sathivel Subramaniam & 5 Ors*; Rayuan Jenayah No. C-06A-7-05-2023 on 15 August 2023, which binds this court and the subordinate courts, it is incorrect in law, to apply the maxim "*generalibus specialia derogant*" and conclude that, due to s. 49 of the MACC Act, there is no scope for application under s. 117 of the CPC.

[13] Therefore, it is not appropriate for learned counsel for the respondent, in his submission before the learned Magistrate, to contend or imply that the High Court decision (which the learned Magistrate is bound to adhere to unless overruled by higher courts) reported in *Dalam Perkara Sathivel Subramaniam & Yang Lain* [2023] 7 CLJ 223, has not been overruled and still stands as valid law.

[14] The learned DPP submitted the purpose of their application for revision is not to re-instate the application for remand of the respondent or to re-arrest the respondent but to rectify the legal interpretation adopted by the learned Magistrate in rejecting the DPP's application under s. 117 of the CPC.

[15] On the other hand, learned counsel for the respondent argued before this court that the issue of remand has become academic and that this application for revision ought to be dismissed.

[16] Indeed, the matter has become academic as the respondent was released by the learned Magistrate on 12 January 2024, the DPP is not seeking to reinstate the remand application or to re-arrest the respondent and thus there is no longer any live issue.

[17] As a general rule, the court would not entertain any application for revision and determine any issues arising therefrom when the matter has become academic.

[18] However, despite the issue having become academic, learned counsel for the respondent before this court, continued to submit the application of the maxim of "*generalibus specialia derogant*" concerning s. 117 of the CPC and s. 49 of the MACC Act.

[19] Additionally, learned counsel for the respondent in his submission, also expressed doubts regarding the ratio the Court of Appeal's decision on 15 August 2023 in *PP v. Sathivel Subramaniam & 5 Ors*; Rayuan Jenayah No. C-06A-7-05-2023, which overturned the High Court's decision reported in *Dalam Perkara Sathivel Subramaniam & Yang Lain* [2023] 7 CLJ 223, as the Court of Appeal's decision was unreported, and access to it was unavailable to learned counsel to ascertain its ratio.

[20] In the circumstances and premises, it is desirable that this court should allow the criminal revision as applied for by the DPP and in view of the decision of the Court of Appeal in *PP v. Sathivel Subramaniam & 5 Ors*; Rayuan Jenayah No. C-06A-7-05-2023 on 15 August 2023 which held that it is incorrect in law to reject an application for the remand under s. 117 of the CPC of a suspect for an offence under the MACC Act based on the existence of provisions under s. 49 of the MACC Act, by applying the maxim "*generalibus specialia derogant*" as decided by the High Court reported in *Dalam Perkara Sathivel Subramaniam & Yang Lain* [2023] 7 CLJ 223.

[21] Allowing the criminal revision as applied for by the DDP serve to dispel any lingering uncertainties on the issue that may persist in the subordinate courts due to similar contentions being raised to oppose such applications as learned counsel for the respondent has advanced in his submission before this court. *Eg*, the Court of Appeal's decision on 15 August 2023 in *PP v. Sathivel Subramaniam & 5 Ors*; Rayuan Jenayah No. C-06A-7-05-2023 was unreported, and access to it was unavailable to ascertain its *ratio*.

See: *PP v. Mohd Shaifuldin Khairudin & Ors* [2006] 5 CLJ 678; *Ting Tiong Choon v. PP* [2016] CLJU 1612; [2016] 1 LNS 1612; [2017] 7 MLJ 541; and *PP v. Vira Prihatin & Ors* [2018] 8 MLJ 421.

[22] In the premises, this court holds that it is incorrect in law for the learned Magistrate to reject the DPP's application for remand of the respondent under s. 117 of the CPC by invoking the maxim "*generalibus specialia derogant*" due to the existence of the provisions under s. 49 of the MACC Act.

[23] The decision of the learned Magistrate on 12 January 2024 ought to be set aside. However, considering the submission of the learned DPP and that the matter has become academic, no order is made for the remand application before the learned Magistrate to be re-instated and reconsidered in the light of and in accordance with the criteria under s. 117 of the CPC.